IN THE

Supreme Court of the United States

OCTOBER TERM 1943.

No. 154.

ANDERSON NATIONAL BANK, Suing on Behalf of Itself and All Others Similarly Situated, *Appellants*,

v.

H. CLYDE REEVES, Individually and as Commissioner of Revenue of the State of Kentucky, etc., et al., *Appellees*.

BRIEF OF THE COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, AS AMICUS CURIAE, BASED UPON HIS INTEREST IN THIS CASE FROM AN ADMINISTRATIVE STANDPOINT.

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PRELIMINARY STATEMENT.

Comes now, as *amicus curiae*, Preston Delano, Comptroller of the Currency of the United Sates, the officer charged by law with the administration of the National Bank Act, and with the direction of the liquidation of insolvent na-

tional banks, to urge adherence to the doctrine of *First National Bank of San Jose* v. *State of California*, (1923) 262 U. S. 366, and the reversal of the decision of the court below.[1] The Kentucky statute under consideration is, by its terms, applicable to going national banks and to receivers of insolvent national banks,[2] and there are two such receiverships in Kentucky, The National Bank of Kentucky, Louisville, with liabilities of $34,000,000 at suspension, and The Taylor National Bank of Campbellsville, with liabilities of $1,500,000 at suspension.[3] The appellant National Bank sues on behalf of itself and all others similarly situated. Section 20 of the Kentucky statute[4] authorizes employees of the Department of Revenue of the State to examine all records of national banks, where there is reason to believe that there has been, or is, a failure to report property which should be reported under the provisions of the Act. We believe these features of the Kentucky Escheat Act to be in conflict with federal statutes and the decisions of this Court.

ARGUMENT.

In the case of *First National Bank of San Jose* v. *State of California*, (1923) 262 U. S. 366, (hereinafter referred to as the San Jose Case) this Court considered the applicability of an escheat statute of the State of California which, in its terms, purported to effect the escheat to the State, of deposits which had been inactive for a period of twenty years in national banks within the State. That statute, Section 1273 of California Code of Civil Procedure, is similar to the Kentucky Escheat Statute now under consideration. This Court concluded that the California statute was

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[1] (R. 53, 89) Opinion, 293 Ky. 735, 170 S. W. (2d) 350. Final Decision, 294 Ky. 674, 172 S. W. (2d) 575.

[2] Section 2 (R. 19).

[3] Annual report of the Comptroller of the Currency to Congress, Jan. 6, 1943, pp. 68, 73.

[4] (R. 29, 30).

not applicable to national banks, and said, at pages 369, 370:

"Plainly, no State may prohibit national banks from accepting deposits or directly impair their efficiency in that regard. And we think, under circumstances like those here revealed, a State may not dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due; the settled principles stated above oppose such power.

Does the statute conflict with the letter or general object and purposes of the legislation by Congress? Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principiis* should be adhered to. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738; *Farmers' and Mechanics' National Bank* v. *Dearing*, *supra*; *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1; *Davis* v. *Elmira Savings Bank*, *supra*; *Easton* v. *Iowa*, *supra*; *Covington* v. *First National Bank*, 198 U. S. 100; *Farmers and Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516; *Choctaw, Oklahoma &*

Gulf R. R. Co. v. *Harrison*, 235 U. S. 292; *Bank of California* v. *Richardson*, 248 U. S. 476."

In the same year that the San Jose Case was decided by this Court, the case of *Security Savings Bank* v. *California*, (1923) 263 U. S. 282, was decided, in which it was held that the above-mentioned statute was constitutional with respect to its application to banks incorporated under the laws of California. But the conclusion reached in the San Jose Case, with respect to national banks, was emphasized in a footnote on page 284, which states:

> "That the statutes are invalid as applied to National banks was settled in *First National Bank* v. *California*, 262 U. S. 366."

This Court had occasion to again consider the doctrine of the San Jose Case in the case of *National City Bank* v. *Philippine Islands*, (1937) 302 U. S. 651, on a petition for certiorari to the Supreme Court of the Philippine Islands, involving a statute somewhat similar to the Kentucky statute now under consideration. In that case the Court of First Instance of Manila held that the statute was not applicable to national banks. The Supreme Court of the Philippine Islands reversed the lower court. This Court, in its *per curiam* decision, reversed the Supreme Court of the Philippine Islands, and affirmed the decision of the Court of First Instance of Manila, "upon the authority of" the San Jose Case and others,[5] holding that the statute there in question did not apply to national banks. The pertinent portion of the opinion of the Court of First Instance of Manila will be found on page 170 of the record of that case before this court, wherein the lower court said:

> "The sole question involved in this action is one of law, to wit: Whether unclaimed deposits made in a local branch of a national banking association may consti-

[5] Domenech v. National City Bank, 294 U. S. 199, 204, 205; and Posadas v. National City Bank, 296 U. S. 497, 499, 500.

tutionally be escheated to the Philippine Government under the terms of Act 3936. It is universally held that national banking associations and their branches are instrumentalities of the United States Government and that the various states in the United States have no power to escheat deposits made therein. First National Bank of San Jose v. California, 67 L. Ed. 1030. * * * It is therefore the opinion of the court that this action is controlled by the decision of the United States Supreme Court in the case of First National Bank of San Jose v. California, 67 L. Ed. 1030, and that judgment with costs de officio, shall be entered for defendant, The National City Bank of New York, declaring the deposits, subject of this action, may not be escheated to the Philippine Government under Act 3936."

This court again cited the San Jose case in 1940 in *Colorado National Bank* v. *Bedford*, 310 U. S. 41, 50.

For more than twenty years the doctrine of the San Jose Case has been followed by federal and state courts alike. Our attention has not been called to one single case, decided during that time by any court, holding that a statute similar to the Kentucky Escheat Statute was applicable to national banks. As illustrating the reliance of the courts, both federal and state, upon the San Jose Case, we cite the following: In *Starr, Attorney General of Michigan* v. *O'Connor, Comptroller of the Currency, et al.* (C. C. A. 6, 1941) 118 F. (2d) 548, *certiorari denied, Starr* v. *Schram*, 314 U. S. 695, an attempt was made to require the Comptroller and the receiver of an insolvent national bank to pay over to the state authorities, liquidating dividends which might have been payable to owners of accounts, if they had established their claims in the manner prescribed by section 5236 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 194) appendix, p. 29. The Circuit Court of Appeals for the Sixth Circuit there held that the Michigan Escheat Statute, which was similar to the Kentucky statute with respect to dormant accounts, was not applicable to insolvent national banks. Since that date the Michigan act has

been further amended and a case involving the amended Act is now pending before the Circuit Court of Appeals for the Sixth Circuit. The same conclusion was reached in *In re Commercial National Bank of Philadelphia*, (D. C. E. D. Pa. 1942) 45 F. Supp. 482, *affirmed per curiam* (C. C. A. 3, 1943) 134 F. (2d) 172. In the case of *American National Bank of Nashville, et al.* v. *Clarke, Superintendent of Banks*, (Tenn. 1940) 135 S. W. (2d) 935, action was initiated by a going national bank and others, to test the applicability of the Tennessee statute to national banks. That statute is somewhat similar to the Kentucky Escheat Statute here involved. The Supreme Court of Tennessee followed the doctrine of the San Jose Case in holding that the statute was not applicable to national banks.

ADMINISTRATIVE ACTIVITY IN RELIANCE UPON THE SAN JOSE CASE.

The Comptroller of the Currency has consistently adhered to the doctrine of the San Jose Case, in answering inquiries concerning going national banks and in directing the conduct of his agents, the receivers of insolvent national banks. Copies of specimen letters relating to the Kentucky, Minnesota and Wisconsin Escheat Acts are set out in the appendix hereto, pp. 21-28. Millions of deposit contracts have been made with national banks since this Court's decision in the San Jose Case, and its affirmation in the cases of *Security Bank* v. *California*, *supra*, and *National City Bank* v. *Philippine Islands*, *supra*. In the last twenty years the Congress of the United States has not seen fit to change or modify the judicial construction of the national banking laws on this question established by the San Jose Case. During this time the National Bank Act has been amended and the Federal Deposit Insurance Corporation has been created. A great majority of state legislatures have, by their inactivity in this field, acquiesced in the pronouncement of that case. Since its decision, we believe that no state has been successful in seizing funds on deposit in going or in-

solvent national banks by virtue of state statutes vesting in the state authorities power to require payment of dormant accounts to state authorities, without judicial determination that said accounts have in fact escheated to the state.

In addition to the case at bar, similar actions are now pending against a going national bank in Minnesota and against the Receiver of an insolvent national bank in Michigan. Further proceedings in the two actions filed in Minnesota have been delayed pending a final decision in the case at bar. After the final decision in *Starr, Attorney General v. O'Connor, Comptroller of the Currency, et al., supra*, the Michigan statute was amended and a new effort was made to seize dormant deposits in the four hundred million dollar First National Bank-Detroit, insolvent. The contentions of the Comptroller of the Currency concerning the inapplicability of the amended Michigan Act to insolvent national banks were set out in his letter of January 15, 1942 to the Michigan Board of Escheats (App. p. 19). In the second Michigan case, *Ruskton, Attorney General v. Schram, Receiver of the First National Bank-Detroit*, now No. 9638 (C. C. A. 6th) awaiting argument in that court, the United States District Court for the Eastern District of Michigan held the amended Michigan statute inapplicable to insolvent national banks.

Under this Kentucky statute national banks and the receivers of insolvent national banks and perhaps other federal agencies, are required, under threat of penalty, to voluntarily turn over to the state, inactive deposit accounts, without suit, proof of death, intestacy and absence of heirs or next of kin, and without effective notice to the owners, hearing or judicial decree. In the recent case of *State v. Phoenix Savings Bank & Trust Co., et al.*, (1942) 132 P. (2d) 637, the Supreme Court of Arizona in holding a similar statute in that State unconstitutional, said at page 639:

> "The question of the constitutionality of laws of this kind has been before the federal courts a number of

> times and their general principles upheld, *but in each of such cases the statute involved permitted the state to escheat the deposit only when it provided for a judicial determination of the jurisdictional facts, which are (a) death, and (b) lack of heirs and intestacy, and gave proper opportunity for all persons interested in the deposit to appear and contest these two issues.* The leading case on the subject probably is Security Savings Bank v. State of California, 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301, 31 A. L. R. 391, wherein the necessary elements of such a statute are discussed." (Emphasis ours)

The court below is in accord when it says in its opinion (R. 57) "* * * —we would unhesitatingly say that there can be no escheat except pursuant to judicial determination made after legal notice," but it holds that nevertheless the State of Kentucky may take deposits from a National bank without suit, effective notice to the owner, hearing, or judicial decree. We submit that these views cannot be reconciled.

If such a statute is applicable to national banks or the receivers of insolvent national banks, the states might impose limitations and restrictions as various and numerous as the states. This Court said in this connection in its opinion in the San Jose Case, at page 370:

> "If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results."

As illustrative of the validity of that statement, inactive demand deposits would be seized from national banks and from receivers of insolvent national banks after seven years under the present Michigan statute, and after ten years under the Kentucky statute involved in the case at bar.

It is a fact that national banks regularly recognize judgments, and decrees of courts of competent jurisdiction, in probate, garnishment, and other proceedings transferring

ownership of deposit accounts to persons other than the bank record owners. In the case of *Security Savings Bank v. California, supra*, this Court recognized, at page 287, that the escheat procedure there involved resembled garnishment. But, as applied to dormant accounts in insolvent national banks, the procedure would have the effect of creating claims against the receivership fund which did not exist prior to the application of the statute, because of the failure of the owners of those accounts to prove claims in accordance with the requirements of U. S. C. title 12, sec. 194 (App. p. 29). The status of creditors of an insolvent national bank is similar to that of creditors of a bankrupt estate being administered under the federal bankruptcy act; as a condition precedent to sharing in the proceeds of liquidation they must prove their claims as prescribed by the Act. Whereas it has been held that a creditor of one who has properly proved his claim against a bankrupt can, with the consent of the bankruptcy court, bring garnishment proceedings against the trustee in bankruptcy to enforce the application of the dividends due the judgment debtor against the amount due on that judgment,[6] we find no case in which garnishment proceedings were effective to give the judgment creditor a right to file a claim against the bankrupt estate which had not been filed by the judgment debtor. Yet if the Kentucky statute is held applicable to insolvent national banks, there would seem to be no cogent reason why it would not be likewise effective with respect to dormant obligations of bankrupts whose estates are being administered under the federal bankruptcy act, thus giving to the states the power to assert ownership and file claims on all obligations of bankrupts which have been inactive for the statutory period and on which claims have not otherwise been filed.

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[6] 2 Remington on Bankruptcy (4th ed. 1943 Supp.) 109; In re Chakos, (D. C. W. D. Wis. 1930) 36 F. (2d) 776; National Automatic Tool Co. v. Goldie, (D. C. Minn. 1939) 27 F. Supp. 399.

Depositors in banks are aware that statutes of limitations and laches are not valid defenses to their deposit claims. All banks are aware that many depositors intentionally permit certain of their accounts to remain inactive for periods of more than 7 years, 10 years, or even 20 years. There can be no valid presumption that such accounts have been abandoned. This feature is discussed in *State v. Cook*, (1931) 41 Ohio App. 149; 180 N. E. 554, wherein the court held invalid a similar Ohio statute; the court saying at page 558:

> "But that is only a minor confusion. Note the definition of who are unknown depositors. Note the manner in which the Legislature seemed to appropriate and confiscate the property of a depositor. To illustrate: A person wishing to provide a sum for his future needs deposits a sum in a bank, intending to leave it there, to forget it, if you please, until some time in the future. He does not add to it; he does not draw the interest; he does not do a thing with it. He is in and out of the bank every day. He has other accounts that are workable and alive. The bank officials see him every day and know him and yet under this statute he is an 'unknown depositor,' and that deposit after seven years must be reported under a penalty of $500 to the probate judge, and after eight years it must be transferred to the county treasury without the depositor's knowledge, without his consent, and thenceforth, when he wants to reclaim it, the interest has ceased—he can only recover the sum which the bank turned over to the county treasury. In other words, his money is taken from a source where he thought it would be safe and drawing interest, a source upon which he relied for his future welfare, and, without his knowledge or consent, it is put in the hands of another custodian, which may or may not be good; but in any event, his right to interest, after the county treasury receives it, has been cut off.
>
> We say that this violates the Constitution of the State of Ohio and the Constitution of the United States. It interferes with the freedom of contracting. It alters and changes the obligation of a contract. It violates the principle laid down in the Dartmouth College Case

and hundreds of cases since that time. Do not think that this is a fanciful notion, for I have in mind now an instance in which a party, wishing to provide a fund to take care of funeral expenses and such things at her decease, deposited a certain sum in one of the Cleveland banks some twenty years ago. The party has been in and out of that bank ever since, and has had other deposits in that bank, and yet, according to that statute, this person is an unknown depositor and the money could be taken and deposited with the county treasury and her interest in this fund would cease after it had been deposited.

I have two other cases in mind in this county where these very things are taking place. The depositors are no more unknown than any other depositor who goes in the bank every day. The Legislature cannot by a mere statute make white black or black white. Because the Legislature says that under a certain sunlight a black object shall be white, that does not make it white; it is black just the same, and so when it defines an unknown depositor it cannot make some one known unknown by a mere definition."

The court below said in its opinion (R. 58, 59):

"The mere taking away of the depositor's right of action against the bank constitutes no substantial deprivation of property when, in lieu thereof, he is afforded an action against the Commonwealth, the most perfect of all protection.

Nor does the requirement that the owner making claim must publish notice of his claim in the newspaper within fifteen days after filing it impose such a burden as to constitute a substantial deprivation."

"The average unclaimed and unproven account amounts to nine dollars." *Starr* v. *O'Connor*, *supra*, page 550. If this average is applicable to the appellant bank, which like all National banks is required to be a member of the Federal Deposit Insurance Corporation, the depositor or his personal representative can now expect to receive indefinitely his entire nine dollars, plus any interest accruing, from his local bank without undue formality. If the de-

posit is taken from the local bank under the Kentucky statute, interest stops, the sum of nine dollars is reduced by the cost of an expensive newspaper advertisement required to be published by the claimant, a proceeding to recover must be instituted at Frankfort and the depositor loses his right to claim five years after his deposit has been adjudged abandoned. Under the Michigan statute the depositor can recover, within a limited time only, the amount of the deposit, "* * * less any expense incurred by the State." *Starr* v. *O'Connor, supra*, page 551.

This court said, with reference to a state bank, in *Provident Institution for Savings* v. *Malone*, (1911) 221 U. S. 660, 665:

> "Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation, the then depositors would receive the money of those absent and unknown."

This statement does not appear to be applicable to insolvent national banks. The rule as to such insolvent associations is substantially similar to the rule in bankruptcy, decedent's estates and equity receiverships where distribution is made only to those creditors who have proved claims. To quote from the opinion in *In re Commercial National Bank, supra*, pages 485, 486:

> "The statute providing for the distribution of funds in the hands of the receiver of a national bank reads in part as follows: 'From time to time * * * the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.' 12 U. S. C. A. 194.

(5) In view of this statute, it is my opinion that the contract of deposit which is created when one deposits money in a national bank gives to such depositor a tontine right to receive his ratable proportion of any unclaimed deposits in case of insolvency and liquidation of the bank. The statute also gives to the stockholders of the bank the right to receive whatever surplus may remain after payment in full of all proper claims.

(6) Principles of comity require that the national courts and the state courts should function as a harmonious and unified system in the administration of the law; but such considerations must yield to the paramount right of Congress to establish a uniform system of laws on any subject coming within the sphere of the delegated congressional functions, and to the resulting right of litigants to invoke the jurisdiction of the national courts in determining disputes arising thereunder. It has never been doubted that the liquidation of national banks is a proper subject for congressional action. If state laws of escheat were permitted to operate upon unclaimed funds in the hands of a receiver of a national bank, confusion and inequality of distribution would be the inevitable result. In states whose escheat laws throw out a dragnet within which to enmesh all the unclaimed funds in the receiver's hands, neither the bank's creditors who prove claims nor the stockholders would receive any benefit from the existence of unclaimed funds, however large. In other states whose escheat laws are less than all inclusive, creditors and stockholders would receive some benefit but not to the full extent of the fund, and in other states which have no special escheat statutes, creditors and stockholders of the bank would participate in the entire unclaimed funds. Clearly Congress did not contemplate that depositors and stockholders of national banks should be subject to any such discriminatory laws.

(7, 8) It must be remembered that the so-called "unclaimed" funds in the receiver's hands are not actually unclaimed within the true meaning of that word, unless the total moneys in his hands be more than enough to pay in full all creditors who have proved claims. The relation between a bank and its ordinary depositors is that of debtor and creditor. The books

of the bank may show credits to depositors who, after the bank is closed, fail to make any claim against the bank; but this fact does not necessarily result in unclaimed funds, nor does it serve to earmark particular funds of the bank as the property of such depositors. All the funds on deposit in the bank other than those held in trust belong to the bank, and upon insolvency are to be distributed ratably by the Comptroller to the creditors who prove their claims under the law. Only in case a surplus exists after proven claims have been paid in full may a receiver of a national bank be said to have unclaimed funds in his hands. As I have already pointed out, even this surplus must under the federal statutes be distributed to the stockholders, and is not subject to escheat at the hands of a state.

(9) The 1935 amendment to the Pennsylvania Escheat Statute providing for the escheat of unclaimed moneys in the hands of a receiver of a national bank contravenes the foregoing federal statute which provides for the ratable distribution thereof and is therefore invalid: Starr v. O'Connor, supra. First National Bank of San Jose v. State of California et al., 262 U. S. 366; 43 S. Ct. 602, 67 L. Ed. 1030."

In the case of *United States* v. *Klein, Escheator of Pennsylvania*, (1938) 303 U. S. 276, a fund belonging to unknown bondholders had been deposited in the District Court and later covered into the Treasury of the United States under Section 995 U. S. R. S. The Escheator of the Commonwealth of Pennsylvania, proceeding under a Pennsylvania statute, which authorized the escheat of moneys paid into court where the persons entitled to them have remained unknown for seven years, petitioned the District Court to declare an escheat of the fund. The Court dismissed the petition on the grounds that there had been no declaration of escheat and that it was without jurisdiction to decree an escheat. The District Court said (15 F. Supp. 473):

"Any claimant, however, would be required to show title before he could receive an award. This likewise includes Pennsylvania."

The Pennsylvania Escheat Act was then amended to give the Court of Common Pleas jurisdiction to decree such escheats. Appropriate procedure was then initiated by the Escheator of the Commonwealth in the Court of Common Pleas, and that court decreed the funds therein involved escheated to the state. That decree was affirmed by the Supreme Court of Pennsylvania and likewise affirmed by this Court. In its opinion this Court said, at page 282:

> "*The present decree* for escheat of the fund is not founded on possession and *does not disturb or purport to affect the Treasury's possession of the fund or the district court's authority over it. Nor could it do so.* * * * At most the decree of the state court purports to be an adjudication upon the title of the unknown claimants in the fund by a proceeding in the nature of an inquest of office as in the case of escheated lands, * * *." (Emphasis ours)

In accordance with the opinion of this Court, the Escheator of the Commonwealth of Pennsylvania applied to the United States District Court for an order for the payment of the fund to him and this was granted by the District Court and affirmed by the Circuit Court of Appeals for the Third Circuit, 106 F. (2d) 213, *certiorari denied*, (1939) 308 U. S. 618. It will be observed that in this case there was no seizure of funds or requirement that they be voluntarily delivered to the Escheator of the Commonwealth under threat of penalty for failure to comply, and there was a judicial determination of the escheat as a condition precedent to the payment of the funds to the Escheator.

It is believed that some parallel may be drawn between that case and certain aspects of the case at bar. Certainly as to insolvent national banks being administered by receivers appointed by the Comptroller of the Currency, the funds are as much in the possession of officers of the United States as in the case of *United States* v. *Klein*, *supra*. Section 5234 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 192) appendix 28 prescribes that the receiver

of an insolvent national bank shall pay over all money representing the proceeds of liquidation, to the Treasurer of the United States, subject to the order of the Comptroller, or that the Comptroller may deposit any such money in any regular government depositary, or in any state or national bank in the city or town where the insolvent bank is located or in any city or town adjacent thereto, but shall require as security for such deposits that United States bonds or other satisfactory securities be deposited with the Treasurer of the United States. From these funds the Comptroller pays ratable dividends to those who have established their claims in accordance with the provisions of section 5236 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 194). (App. p. 29) All of the funds of an insolvent national bank, less administrative expenses, are owned by those who prove their claims in accordance with the provisions of that statute. As was said in the case of *In re Commercial National Bank, supra,* the contract of deposit with a national bank gives to each depositor a tontine right to receive a ratable proportion of any unclaimed deposits in the case of insolvency and liquidation of the bank; whereas that, of course, was not true with regard to the *unclaimed fund* involved in the case of *United States* v. *Klein, supra.*

Going national banks are instrumentalities of the federal government, created by Congress to enable it to exercise its fiscal powers and conduct its financial operations. They are supervised by federal authorities and their interests are, therefore, a particular concern of the federal government. *McCulloch* v. *Maryland,* (1819) 4 Wheat. 315; *Easton* v. *Iowa,* (1903) 188 U. S. 220; *Osborn* v. *United States Bank,* (1824) 9 Wheat. 738. The State of Kentucky should not be permitted to disturb any account in a national bank or the bank's control over it unless and until the State has obtained a valid judicial determination that the depositor has died intestate, without heirs or next of kin or other *bona fide* claimants to the fund. We, therefore, submit that such federal instrumentalities are not subject

to the summary procedure by which funds on deposit in dormant accounts would be seized under the Kentucky Escheat Act.

VISITORIAL PROVISIONS OF STATUTE CANNOT BE ENFORCED AGAINST NATIONAL BANKS.

Section 20 of the Kentucky statute (R. 29, 30) authorizing employees of the Kentucky Department of Revenue to examine the books and records of all banks is inapplicable to national banks. Section 5240 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 484) provides as follows:

> "No [national] bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized." (Insert ours.)

No federal statute gives to state authorities visitorial powers over national banks. On the contrary, when the Congress saw fit to prescribe in section 11(k) of the Federal Reserve Act of 1913, as amended (U. S. C. title 12, sec. 248(k)) that state banking authorities may have access to reports of examination made by the Comptroller of the Currency, in so far as such reports relate to the trust departments of such banks, there was a specific proviso, as follows:

> "* * * but nothing in this chapter shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank."

In the case of *Guthrie* v. *Harkness*, (1905) 199 U. S. 148, the Court said, at page 158, regarding section 5240 of Rev. Stat., above quoted, that:

> "* * * The right of visitation being a public right, existing in the State for the purpose of examining into the conduct of the corporation with a view to keeping

it within its legal powers, Congress had in mind in passing this section that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that *no state law or enactment should undertake to exercise the right of visitation over a national corporation.* Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power." (Emphasis ours)

CONCLUSION.

The law on this question in Kentucky, California, Michigan, Minnesota, Wisconsin and all other states will remain settled if this Court reverses the Court of Appeals of Kentucky and holds the Kentucky statute inapplicable to national banks "upon the authority of" the San Jose Case decided in 1923, and the Philippine Islands Case decided in 1937.

It is submitted that the decision of the Court of Appeals of Kentucky holding this Kentucky statute applicable to national banks should be reversed.

Respectfully submitted,

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TREVOR V. ROBERTS,
Attorneys for Preston Delano, Comptroller of the Currency.

APPENDIX.

TREASURY DEPARTMENT
OFFICE OF THE COMPTROLLER OF THE CURRENCY

January 15, 1942

State Board of Escheats,
State of Michigan,
Lansing, Michigan.

Gentlemen:

Mr. B. C. Schram, Receiver of the First National Bank-Detroit, Detroit, Michigan has forwarded to this office a copy of the printed demand he received from your Board on December 30, 1941 that he file a report within 60 days of all unclaimed or uncalled for or abandoned monies, credits, securities, liquidated choses in action and property of any kind or nature, real, personal or mixed, held by him or under his control or in his possession, pursuant to Act 170 of the Public Acts of Michigan for 1941, effective June 16, 1941.

We consider this demand the assertion of a claim against this insolvent National bank to be disposed of under the following language in the opinion of the Supreme Court of the United States in *White* v. *Knox, Comptroller of the Currency*, 111 U. S. 784, 788:

> "It was the duty of the Comptroller, if not satisfied of the correctness of the claim when presented, to disallow it, and, if an attempt was made to obtain its adjudication, to make such defence as in his judgment was proper."

It is the position of all insolvent National banks located in the State of Michigan that the Act of the Michigan Legislature approved June 16, 1941 is wholly inapplicable to the Receiverships in that it is in conflict with the provisions of the National Bank Act, a code by itself for the winding up of these institutions and that the Act is substantially a forfeiture statute rather than an escheat statute as was held by the United States Circuit Court of Appeals for the Sixth Circuit in Starr v. Schram, 118 Fed. (2nd) 548, certiorari denied December 22, 1941 wherein this and a simi-

lar Michigan statute were before the court. Accordingly all Receivers of insolvent National banks located in Michigan will respectfully decline to furnish reports of the character involved in the demand of your Board addressed to the Receivership of the First National Bank-Detroit, Detroit, Michigan.

In the event of a suit or suits against Receivers of insolvent National banks located in the State of Michigan to require compliance with this State statute all defenses available to both operating National banks and closed National banks will be interposed. The authorities relied on by our Receivers, in addition to *Starr* v. *Schram, supra*, and the decisions cited therein, will include *Cook County National Bank* v. *United States* (1882) 107 U. S. 445; *Davis* v. *Elmira Savings Bank* (1896) 161 U. S. 275; *Guthrie* v. *Harkness* (1905) 199 U. S. 148; *Easton* v. *Iowa* (1903) 188 U. S. 220; *Deitrick* v. *Greaney* (1940) 309 U. S. 190 and *American Surety Company* v. *Bethlehem National Bank*, (1941) 86 L. Ed. (Adv. Sheets) page 231.

As you know the insolvent National banks now in Receivership in Michigan have been in liquidation for nearly nine years. The final closing of some of these Receiverships has been withheld pending the outcome in *Starr* v. *Schram, supra*, which was finally disposed of on December 22, 1941. The Comptroller of the Currency considers it his duty to close all National bank Receiverships in Michigan at the earliest possible date thus granting final relief to the residents of Michigan who are depositors and creditors. Accordingly we will feel free to finally close all such Receiverships unless suit to establish the claims of your Board against any such Receivership is filed prior to March 16, 1942. If your Board decides to file further litigation which may be carried through to the Supreme Court of the United States we are hopeful that your action can be limited to the First National Bank-Detroit Receivership, plus possibly some few additional Receiverships, in that the amount involved in the smaller Receivership, even though it could be established that this State statute is applicable, would seem to be insufficient to require the depositors and creditors to assume the expense of keeping the Receiverships open with the consequent delay in final distribution.

Yours very truly,

(s) R. B. McCandless
Deputy Comptroller

May 25, 1943

Mr. R. S. Beatty,
Chief National Bank Examiner,
Ninth Federal Reserve District,
223 Federal Office Building,
Minneapolis, Minnesota.

Dear Mr. Beatty:

Reference is made to your letter of May 5, 1943, in which you enclosed a copy of a Bill passed under date of April 24, 1943, by the Legislature of the State of Minnesota, pertaining to the escheat of bank deposits. Subsection 2 of Section 1 of the Act includes national banks in the definition of the term "banking institution." Since this Act will probably provoke inquiries on the part of national banks in the State of Minnesota as to whether or not they must comply with its provisions, you inquire as to the position you should take in this matter.

Historically, the term "escheat" had reference to the reversion of title to property to the sovereign power which granted the original estate, when the last owner died intestate, leaving no heirs or next of kin entitled to take his property. The term now is applied to cover both real and personal property. We have little doubt that if a person died intestate, leaving real or personal property but no heirs or next of kin, and an administrator was appointed for his estate, a national bank could be required to pay any funds on deposit in the name of said decedent to the administrator, despite the fact that after the payment of the debts and funeral expenses of the decedent the unclaimed balance would escheat to the state. However, a number of recent statutes, although labelled "Escheat Acts," are in effect forfeiture statutes, not predicated upon proof of death, intestacy and absence of heirs or next of kin. As to the applicability of such statutes to deposits in a national bank, we have serious doubt. A review of the recent Minnesota statute indicates that it is of the latter class. Section 2 prescribes that when any person abandons any funds or other property which has been left on deposit with any banking institution, the same shall escheat to and become the property of the State, and Section 3 provides, in substance, that where an account has been dormant for a period of twenty years, the owner is presumed to have abandoned the same.

The financial institutions are required to file annual statements with the Secretary of State, giving certain data regarding such dormant accounts. A procedure is prescribed whereby the Attorney General can initiate action to attach such funds and a further procedure for applying to a court for an order declaring that the funds have escheated to the State and directing the payment by the financial institutions to the Treasurer of the State of the sums in said dormant accounts, which funds will be credited to the general revenue fund. Any person claiming to be legally entitled to any of the funds or property involved and who did not appear in the action is given a period of ten years after the entry of judgment within which to sue the State to recover. If he establishes his right and obtains a judgment, the Attorney General is required to so advise the Legislature and request an appropriation for the payment of the judgment. After the lapse of ten years, however, the claimants' rights are terminated except in certain cases of legal disability.

It will be observed that the Act makes no reference to the death of the owners of said dormant accounts, intestacy or the absence of heirs. It would appear, therefore, to be a forfeiture or confiscatory statute based solely upon inactivity in the accounts for the prescribed number of years. This may be a valid and effective statute in so far as state banks are concerned, as was held in the case of *Security Bank* v. *California*, (1923) 263 U. S. 282, and to the extent of furnishing information regarding the dormant accounts the Act may be binding upon national banks. We are not sure of this point but in the case of *Territory of Alaska* v. *First National Bank of Fairbanks*, (C. C. A. 9th, 1927) 22 F. (2d) 377, a statute which required banks and other financial institutions to furnish information regarding dormant accounts was held to apply to national banks. It happens that the statute in that case more nearly resembled a pure escheat statute predicated upon proof of death of the owner intestate and without heirs. Therefore, the case is not authoritative with respect to the applicability of this phase of a forfeiture or confiscatory statute, to national banks. The case of *Territory of Alaska* v. *First National Bank*, (C. C. A. 9th, 1930) 41 F. (2d) 186, goes somewhat further than the first Alaska case in that it indicates that where the escheat of funds or property to the sovereign power is based upon *presumptions* of death, intestacy and absence of

heirs, resulting from the lapse of a long period of time without any claimants appearing, the statute will be applied to national banks.

In the case of *First National Bank* v. *California*, (1923) 262 U. S. 366, the Supreme Court of the United States flatly declared that a California statute, having the same objectives and somewhat similar characteristics as the Minnesota statute now under consideration, did not apply to national banks, and this case was followed by the Circuit Court of Appeals for the Sixth Circuit in the case of *Starr* v. *O'Connor*, (1941) 118 F. (2d) 548, where the applicability of a Michigan escheat statute to *insolvent* national banks was in issue, and by the Supreme Court of Tennessee in the case of *American National Bank of Nashville* v. *Clarke*, (1940) 135 S. W. (2d) 935. The Tennessee statute was similar to the Minnesota statute with respect to the principles involved, and the court pointed out that valid escheat laws of a state do apply to national banks; but that the Tennessee act really provided for the seizure and confiscation of funds on deposit in banking institutions in accounts which had been dormant for the prescribed number of years, and held that such statutes do not apply to national banks.

The position of this office, therefore, is that pure escheat statutes predicated upon proof of death, intestacy and absence of heirs do apply to national banks, but forfeiture or confiscation statutes, although they may apply to state banks, as indicated by the cases of *Provident Savings Institution* v. *Malone*, (1911) 221 U. S. 660, and *Cunnius* v. *Reading School District*, (1905) 198 U. S. 458, do not apply to national banks.

To what extent national banks can be called upon to furnish information regarding dormant accounts under the provisions of such forfeiture or confiscation statutes, is a matter of some uncertainty but it would seem that if the state is prohibited from availing itself of the benefit of the information furnished, there would be no point in submitting such data to the state authorities.

Whether or not national banks in the State of Minnesota should voluntarily submit to the provisions of the Act of April 24, 1943, is of course matter for the decision of the Boards of Directors of the respective banks. However we believe it would be helpful to have the question of the validity of this statute with respect to national banks definitely determined by judicial decision, and should any national

banks in that State wish to pursue that course we might suggest that in the case of *Starr* v. *O'Connor*, aforementioned, the Attorney General of the State of Michigan initiated an action under the Declaratory Judgment Act, and in the case of *Anderson National Bank* v. *H. Clyde Reeves*, the bank initiated the action under a Declaratory Judgment Act on behalf of itself and all others similarly situated. In the latter case, which is not yet reported, the Court of Appeals of Kentucky decided, under date of December 18, 1942, that the Act there involved did apply to national banks. We understand, however, that an attempt will be made to have this issue presented to the Supreme Court of the United States. We observe that Section 8 of the Minnesota statute prescribes penalties for failure to comply with the Act. Nevertheless there is a provision that no bank or financial institution shall become subject to the penalty for failure to comply, if such failure is based upon its contention, in good faith, that the provisions of the Act are invalid as applied to it. This would seem to be adequate to protect any national banks which wished to contest the applicability of this statute to national banks.

Please keep us informed of any further developments in this matter.

Very truly yours,

/s/ L. H. Sedlacek,
Deputy Comptroller.

March 25, 1940

Mr. A. B. Faris,
National Bank Examiner,
Richmond, Kentucky.

Dear Mr. Faris:

Reference is made to your letter of March 8, 1940, in which you enclosed a copy of House Bill No. 321 recently passed by the Legislature of Kentucky, which provides, among other things, for the escheat of certain funds held by national banks. You desire an interpretation of the effects of this Bill in so far as national banks are concerned.

We have very carefully reviewed the copy of the Bill which you forwarded to us and have concluded that it comes within the reasoning of the Supreme Court of Tennessee in the recently decided case of *American National Bank of*

Nashville v. *Clarke*, (Tenn. 1940) 135 S. W. (2) 935, and the United States Supreme Court in *First National Bank of San Jose* v. *State of California*, (1923) 262 U. S. 366, and, therefore, would not be applicable to national banks doing business in the State of Kentucky. There are three provisions in House Bill No. 321 which are especially pertinent in regard to whether such Bill would be applicable to national banks. Sections 7 and 8 provide that after deposits have been dormant for a certain number of years, such deposits will be considered abandoned and that national banks, along with other banks of the Commonwealth, must report such deposits and pay them over to the Department of Revenue of that State. Section 20 of the Bill provides that the Department of Revenue of the Commonwealth, through its employees, are authorized to examine all records of state and national banks where there is reason to believe there has been or is a failure to report deposits which should be reported under the provisions of this Bill.

These provisions are almost identical with the provisions contained in the Act of the State of Tennessee which was considered by the court in *American National Bank of Nashville* v. *Clarke*, *supra*. The court held that the Act was an unwarranted interference with the business of a national bank.

In view of the manner in which the Kentucky statute is drafted, there is no possibility of bringing it within the category of escheat acts which are applicable to national banks, as for instance that particular statute which was considered in *Territory of Alaska* v. *First National Bank*, (C. C. A. 9th, 1927) 22 F. (2d) 377. The Kentucky Bill is especially inapplicable to national banks since it purports to grant to state authorities the right to examine and inspect the books and records of national banks. You are aware of course that this is specifically prohibited by the National Bank Act, and, therefore, the State statute must be considered void in so far as it conflicts with Federal legislation. See *Davis* v. *Elmira Savings Bank*, (1896) 161 U. S. 275, 283, 288, and 289; *Farmers' and Mechanics' National Bank* v. *Dearing*, (1875) 91 U. S. 29, 33 and 34; *Easton* v. *Iowa*, (1903) 188 U. S. 220, 229.

In addition, this statute purports to interfere with the ratable distribution mandate of the National Bank Act with regard to the recognition of claims against insolvent national banks and the payment of dividends thereon, and,

therefore, the provisions of the Kentucky Bill in that re
gard must be considered as void. See *People ex rel. Barrett* v. *Union Bank & Trust Company*, (Ill. 1935) 199 N. E. 272; *Spradlin* v. *Royal Mfg. Co.*, (C. C. A. 4th, 1934) 73 F. (2d) 776; and *Jennings* v. *U. S. F. & G. Co.*, (1935) 294 U. S. 216.

Since the requirements of the Bill relative to the filing of reports with the Department of Revenue is an integral part of the Bill and is obviously only a means of carrying out the provisions of the Bill, we believe that those provisions are likewise inapplicable to national banks.

It, of course, must be realized that the conclusions set forth in this letter merely represent the view of this office and that the responsibility for failing to comply with the provisions of the state statute must be upon the board of directors of each particular national bank.

However, in case any of the counsel for any particular bank considers the question here involved, they should give consideration to the following additional authorities pro and con: *National City Bank* v. *Philippine Islands*, (1937) 302 U. S. 651; *Territory of Alaska* v. *First National Bank* (C. C. A. 9th, 1930) 41 F. (2d) 186; *Braun* v. *McPherson*, (Mich. 1936) 269 N. W. 211; *Starr* v. *Schram*, (E. D. Mich. 1938) 24 F. Supp. 888 (which is the subject of appeal at the present time); *In re Anderson's Estate*, (Wash., 1936) 61 P. (2d) 132; and *In Re Liquidation of Farmers State Bank of Ames*, (1937) 84 Okla. App. 410.

Very truly yours,

/s/ E. H. Gough,
Deputy Comptroller.

February 3, 1942.

Mr. B. C. Bunker,
c/o First National Bank,
Hudson, Wisconsin.

Dear Mr. Bunker:

Reference is made to your letter of January 9, 1942, regarding the applicability to a national bank of a statute of the State of Wisconsin dealing with the escheat of deposits. You refer to the statute as (Sec. 220.25) and you explain that the attorneys for the Wisconsin Bankers Association

at Milwaukee have rendered an opinion that the statute does not apply to national banks. However, in answer to a letter to the Secretary of State, you received a reply from the Attorney General of Wisconsin, in which you were advised that it was his opinion that Sec. 220.25 applies to national banks as well as state banks. He informed you at that time that there was an appeal pending before the Supreme Court of the State in which the validity of this statute was in issue and that as soon as that appeal was decided the State would no doubt commence an action against one of the larger national banks. You have certain dormant accounts which might be subject to the statute if applicable to national banks but you do not wish to pay these funds to the wrong person nor subject your bank to double payment. You therefore solicit the advice of this office.

Any opinion of this office relative to the applicability to national banks of a state escheat law cannot be considered as conclusive or directory. The course which a national bank wishes to pursue with respect to any such statute is a matter for the determination of the directors of the bank under the guidance of its own counsel. However, for your information, the only case we have been able to find based upon the section to which you refer is the case of *State* v. *Marshall & Ilsley Bank of Milwaukee*, (1940) 291 N. W. 361. There the Act is referred to as "St. 1939, § 220.25 (1, 2)". You will note in that case that the action involved a state bank and the Supreme Court of Wisconsin held that the Act did not violate the Constitution of the United States for want of due process as to deposits and as to the other items included nor did it impair the obligation of contracts. The Court stated that its decision was controlled by the case of *Security Savings Bank* v. *California*, (1923) 263 U. S. 282, wherein a statute of California of somewhat the same nature was involved. There the Supreme Court of the United States held that the California statute was not in violation of either the due process or the impairment of contract clauses of the Constitution of the United States. However in the case of *First National Bank of San Jose* v. *California*, (1923) 262 U. S. 366, that same statute was held not to be applicable to national banks located in the State of California because it impaired the efficiency of national banks to discharge the duties for which they were created and was an attempt to qualify in an unusual way contracts entered into by national banks with their depositors.

Since we are not sure when you received the opinion from the Attorney General we are uncertain as to whether the case decided by the Supreme Court of your State in 1940 aforementioned was the one he had in mind or whether since the decision in the case of *State* v. *Marshall & Illsley Bank of Milwaukee* there has been a further amendment to the above-mentioned statute which has given rise to another case now pending before the Supreme Court of your State. Any such amendment of course may make a material difference as to the validity of the statute as applied to national banks and without knowing its provisions this office can express no opinion with respect thereto. If you wish us to give the matter further consideration we suggest that you send us a copy of the opinion of the Supreme Court of your State on the new case, if there is one, a copy of the current escheat statute, copies of the opinion of the attorneys representing the Wisconsin Bankers Association, and the opinion of the Attorney General of your State, to which you refer.

Yours very truly,

/s/ R. B. McCandless,
Deputy Comptroller.

TITLE 12 U. S. C.

192. *Default in payment of circulating notes.*

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller.

and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or National bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: *Provided,* That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. (R. S. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614; 339, 49 Stat. 721.)

194. *Dividends on adjusted claims; distribution of assets.*

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives, in proportion to the stock by them respectively held. (R. S. 5236.)